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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 31.

GREENLIEF W. SIMPSON, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

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PLEADINGS.

Claimant, Greenlief W. Simpson, filed petition in the Court of Claims, March 5, 1900, seeking to recover the amount of profit which, as alleged, he could have made under a certain written contract with defendant, dated January 4, 1899, for supplying fresh beef to the United States troops stationed at *interior* posts and camps, on the island of Cuba, during the period of the contract term, namely, January 10, 1899, to June 30, 1899, inclusive (exclusive of fourteen days, March 1 to 14, 1899), but which contract right, at the *interior* post and camp of Quemados, was denied him by defendant (*R.*, *1–4*).

That amount, if recoverable at all, is, as found by the court below, either $31,439.90 or $29,398.42, accordingly as one or the other of two named dates shall be adopted as the expiration or legal termination of the contract term,

as will be hereinafter more fully referred to and explained (*R.*, *14*).

Claimant also sets up the contract right during the period aforesaid, covering the supply of fresh beef used by defendant at the cities of Havana and Matanzas, (being points on the *seacoast* of Cuba,) when Swift & Company, (who were then under contract with defendant to furnish refrigerated, chilled, or frozen beef for points or ports on the coast of Cuba,) did not supply the same; and, for the denial of which claimed contract right, recovery was also sought herein for the amount of profit claimant could have made (*R.*, *1–4*).

That amount, if recoverable at all, is, as found by the court below, $27,356.96 (*R.*, *19*).

The case was argued orally before the court, upon evidence taken on behalf of both claimant and defendant; and the court, thereafter, April 4, 1904, made and filed findings of fact (*R.*, *9–23*) and conclusion of law that the petition of claimant be dismissed, and judgment dismissing the same was accordingly entered. The court, however, filed no opinion in the case (*R.*, *23*).

From that judgment claimant has appealed to this court (*R.*, *24*).

STATEMENT OF THE CASE.

1. Under date, December 22, 1898, defendant advertised for proposals for furnishing slaughtered *fresh* beef delivered in quarters to the United States troops stationed at posts and camps in the *interior* of the island of Cuba, for the period ending June 30, 1899, the beef to dress 400 pounds per carcass, and deliveries permitted of beef from spayed heifers:

> "Deliveries to be in such quantities, at such times, and in such places as the commissaries of the troops to be supplied shall designate. The numbers and locations of such troops are unknown at this time, and bids must be made upon this understanding" (*R.*, *5–6*, *Exhibits A and B*).

For several months prior to entering into the contract hereinafter referred to, claimant investigated the conditions existing on the island of Cuba; had ascertained that the ration of beef for a soldier in Cuba was one pound per man per day; and that from 25,000 to 30,000 soldiers, possibly more, would be quartered on the island; all of which matters were taken into account by him in computing his contract price (*R.*, *15*).

2. Pursuant to the advertisement aforesaid, claimant submitted proposal to furnish the beef embraced therein for 14½ cents per pound; and, being the lowest bidder, was awarded the contract at that price, (*R.*, *10*;) and formal contract, in writing, was entered into, dated January 4, 1899, covering the period January 5, 1899, to June 30, 1899, inclusive, "or such less time for any post as the Commissary General of Subsistence, U. S. Army, may direct" (*R.*, *7–8*, *Exhibit D*).

3. Prior to entering into that contract, and during the fall and early winter months of 1899, preparations had been made by the United States, (under the protocol of the treaty with Spain,) for taking possession of the island of Cuba, and a site had been selected at Quemados, some 8 or 9 miles distant from Havana, (the latter being the nearest *seacoast* point on the island to which the United States transports could go,) for the location of the main body of the United States troops in the vicinity of Havana (*R.*, *10–11*).

That post and camp, at Quemados, was maintained throughout the term of the Simpson contract, some 7,000 soldiers being quartered there at or about the beginning of his contract term, and additional troops sent there, numbering in all, at that post and camp, some 16,000 men in February, 1899, and about 10,000 in March, 1899. The post and camp were continued there until the final withdrawal of the volunteers from the island, which was subsequent to the expiration of the Simpson contract, July 1, 1899 (*R.*, *15*).

4. Prior to entering upon the performance of the contract, claimant, at considerable expense, made all necessary preparatory arrangements in the matter of securing cattle, engaging steamer space for their transportation, etc.; in addition to which he secured and employed agents upon the island of Cuba in the matter of making delivery of beef to defendant; and also, sent there an agent in that behalf from the United States, who, arriving there on January 10, 1899, reported to the chief and depot commissary, Lieut. Col. Smith, U. S. Army (*R.*, *15*).

5. Notwithstanding the contract with claimant, and the fact that Quemados was an *interior* post within the meaning of the language used in the contract (*R.*, *14*), defendant, through its chief commissary of the division of Cuba and depot commissary at the port of Havana, Smith, refused, at the very outset, to allow claimant to deliver beef at Quemados, where there were stationed at the beginning of the contract term about 7,000 soldiers; and defendant purchased from third parties, during the months of January and February (1899), being within claimant's contract term, native beef on the hoof for the use of said troops at Quemados (*R.*, *19*).

6. Claimant protested against this action, and, further, made and filed protests at Washington (*R.*, *19*), the same finally resulting in the acceptance by defendant of beef from claimant, covering the post or camp of Quemados during the period March 1 to 14, 1899, at his contract rate (*R.*, *15*).

7. Thereupon defendant's agent in Cuba having again refused to permit claimant to furnish beef at Quemados upon the ground that it was possible to purchase native beef at a lower price than that fixed in Simpson's contract, and claimant having again protested and appealed to the Secretary of

War at Washington, the latter, under date of May 4, 1899, decided—

(*a.*) That the camp at Quemados is an *interior* post within the meaning of the language used in the contract with Simpson, dated January 4, 1899.

(*b.*) That the claim of contract right to supply fresh beef to the troops stationed at said point is sustained.

In said decision, the Secretary called attention to a provision in the Simpson contract, wherein its duration was limited to June 30, 1899, inclusive, with this limitation: "or such less time for any post as the commissary general of subsistence, U. S. Army, may direct;" and it was accordingly suggested by the Secretary of War that the commissary general of subsistence might take such action under that provision of the contract as in his judgment the best interests of the Government require (*R., 14*).

8. Acting under that suggestion, the commissary general of subsistence, under date May 9, 1899, undertook to arbitrarily suspend all further deliveries by Simpson, under his contract, of beef at said *interior* post of Quemados, and, also, undertook to make the order of suspension retroactive so as to embrace the period from March 12, 1899, to the end of the contract term; although the court below, in finding the amount of loss of profit sustained by claimant by reason of this action, declined (impliedly) to give such retroactive effect to the order of suspension (*R., 14*).

9. Claimant was at all times, during the entire contract period, able, ready, and willing to furnish and supply the beef embraced therein, and protested against the action of defendant in ignoring his contract right (*R., 18*): the cost to him of supplying and delivering the beef at Quemados, under his said contract, was 10½ cents per pound; his contract price therefor was 14½ cents per pound; thus leaving him a profit of 4 cents per pound upon all beef delivered, or which, under his said contract, he was entitled to deliver at

said place, namely, a profit of 4 cents per pound upon 785,997½ pounds (*R.*, *15–16*).

If he had been allowed by defendant to furnish the beef at said place, he would have realized a profit of $31,439.90, treating the expiration of the contract as June 30, 1899, being the date of limitation specified in the contract itself; or $29,398.42, if the contract be deemed to have been legally terminated on May 9, 1899, the date of the communication from the commissary general, in which further deliveries of beef at that post by claimant were suspended, not because of any breach of contract or default in performance by claimant, but under the claimed and asserted arbitrary right in that behalf supposed to be found in that clause of the contract above referred to, and reading:

> "VI. This contract shall be in force from the 5th day of January, 1899, to the 30th day of June, 1899, inclusive, or such less time for any post as the commissary general of subsistence, U. S. Army, may direct" (*R.*, *14*).

10. The foregoing statement of facts covers, in brief, the *first* of the two claims sued on herein, and relates exclusively to the *interior* post or camp at *Quemados*.

11. In addition to the contract with claimant, for furnishing *fresh* beef, slaughtered, dressed, and delivered at posts and camps in the *interior* of the island of Cuba, defendant entered into contract with Swift & Co. for *refrigerated*, chilled, or frozen beef, slaughtered in the United States and delivered at points on the *seacoast* of the island; beef under the latter contract to dress 600 pounds per carcass, from fat steers (*R.*, *20–23*).

12. Prior to entering into contract with claimant, as above the latter inquired of the then United States commissary general, Charles P. Eagan, (by, through, and under whom

the contract was made,) to ascertain the exact extent and scope thereof, and was advised by him that it was the purpose and intent of the department to cover the *entire* beef supply for the island of Cuba by the two contracts aforesaid—Swift & Company, for *refrigerated* beef slaughtered in the United States and delivered at points on the *seacoast* of the island, and claimant (Simpson), for *fresh* beef, slaughtered, dressed, and delivered at posts and camps in the *interior* of the island; and that, when Swift & Company could not so furnish, claimant's contract covered the *entire* island, both *interior* and *seacoast* (*R.*, *15*).

13. During the contract period aforesaid defendant called upon claimant to furnish and supply beef at the following points on the *seacoast* of the island: Trinidad, Cienfuegos, Cardenas, Matanzas, Gibara, and Manzanillo (*R.*, *16–18*).

14. Notwithstanding the contract and agreement with claimant above referred to in respect of furnishing and supplying fresh beef, not only to such posts and camps as were situated in the *interior* of the island, but also throughout the *entire* island, and covering points on the *seacoast*, whenever Swift & Co. could not or did not furnish refrigerated beef under their contract; defendant purchased native beef, slaughtered on the island and used, with or without refrigeration, said purchases having been made from divers persons, including said Swift & Co. In making such purchases from Swift & Co., however, defendant waived the express provisions of the contract with that firm which required the beef to be slaughtered in the United States and delivered, refrigerated, chilled, or frozen, at points on the *seacoast*, as well, also, waived the contract provision as to said Swift & Co., that such beef should dress not less than 600 pounds to the carcass, the same to be from fat steers, etc. (*R.*, *16*).

15. The cities of Havana and Matanzas are *seacoast* points; and, in making the purchases referred to in the last preced-

ing paragraph, defendant paid therefor at the rate of ten cents per pound. It declined and refused to permit claimant to supply beef at those points, notwithstanding his ability, readiness and willingness to furnish and supply the same, and against his protest in being so ignored (*R., 18–19, 23*).

16. The amount of beef so purchased by defendant, and embraced in this the *second* and last item of the claim sued on herein, during the period aforesaid, and covering the cities of Havana and Matanzas, was 683,924 pounds. Claimant, under his contract, would have been entitled to receive therefor from defendant the sum of 14½ cents per pound, and could have realized a profit, had he been permitted to furnish and supply the beef at those two places, of 4 cents per pound the same aggregating, as found by the court below, the sum of $27,356.96 (*R., 19*).

17. All of the beef which was actually supplied by claimant and received by the United States from him has been duly paid for at his contract price (*R., 23*).

18. Claimant has not been paid any part of the amounts embraced in either of the claims hereinabove referred to, (*R., 14, 19*); and those two items of claim constitute the subject-matter of this appeal.

In discussing this case, the same may be conveniently considered under two heads, namely, beef supplied at the *interior* post and camp at Quemados, and beef supplied at the *seacoast* points of Havana and Matanzas.

BRIEF.

It may be remarked at the outset that the case now presented to this court for its consideration and determination is in somewhat the same legal situation as it was at the time of its argument and submission to the court below; save only that that court has found, in detail, the ultimate facts entering into the controversy, and has announced its conclusion of law that the petition of claimant be dismissed, and has entered its judgment dismissing the petition (*R.*, *23*).

That court, however, neither announced nor filed an opinion in the case; and so it is that counsel for claimant, as well also counsel for defendant, labor under the disadvantage of being unable to advise this court in respect of the reasons which, as matter of law, induced or are supposed to support and justify the judgment of the court below.

It is, therefore, not here possible to undertake either to meet or reply to what counsel for claimant may suppose or conjecture to have been controlling in the mind of the court below.

The consideration of the case in the brief will, therefore, be confined to the facts as found and the principles of law claimed to be properly applicable thereto; and therein replying to the objections raised in the court below in the oral and printed arguments submitted on behalf of defendant.

I.

QUEMADOS.

The facts in connection with the transactions between claimant and defendant covering the *interior* post and camp at *Quemados* have been above alluded to and briefly explained.

Before considering the application of the facts to the contract embraced in this suit, and in order to properly deter-

mine the questions here in issue, it may be useful to first consider the relative rights of the contracting parties.

It may be stated, preliminarily, that this contract is to be tested by precisely the same rules of law and governed by the same decisions as if the same had been entered into between individuals. No special privileges and rights are conferred by law in favor of the one party to such contract simply because that one party happens to be the Government.

This principle has been frequently affirmed:

For example, in the case of Gilbert (*1 C. Cls., 28, 37*) the court, speaking of the reciprocal rights and obligations in case of contracts between an individual and the Government, stated:

> "We see no good reason for adopting any different rule in regard to these contracts to which the United States is a party than is applied to those between man and man."

In the case of Curtis (*2 id., 144, 152*) the opinion states, as follows:

> "The rule and principle adopted by this court for the administration of justice between a claimant and the Government is simply to give that measure of relief which the law would award were the action between man and man. The court never gives greater and never gives discretionary relief . . . but the liability of the Government in these cases on contract, express or implied, has been held, generally, to be simply that which claimant might pursue against another defendant in another tribunal."

The same thing was reaffirmed in the case of Brooke (*id., 180–184*).

Again, in the case of The Southern Pacific R. R. Co. (*28 id., 77–105*), it is thus stated in the opinion:

> "We understand the law to be that 'when a government enters into a contract with an individual it

deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of a legislator for that of a moral agent, with the same rights and obligations as an individual' (3 Hamilton's Works, 518; U. S. *vs.* Bank of Metropolis, 15 Pet., 392; Deming *vs.* United States, 1 C. Cls. R., 191). If there are exceptions to the rule just stated, they do not apply to this action."

So, also, in the case of Starin (*31 id., 65, 85*) the court reaffirmed the same doctrine (citing Hall *vs.* Wisconsin, *103 U. S., 5*, and Davis *vs.* Gray, *16 Wall., 203*).

See, also, the same thing in the case of Smoot (*15 Wall., 36*), and particularly in Chicago and Northwestern Railway Co. *vs.* U. S. (*104 U. S., 680*).

Without further citation of authority it may be said to be settled beyond question, that the same principles must be applied in this case as would be applied had the contract here in suit been entered into between individuals.

Therefore the only right reserved to defendant, and upon which it may rely in respect of the enforcement, or attempted annulment, in whole or in part, of said contract, must be found in the contract itself or in the law governing the same.

Applying to the present contract, entered into between claimant and the Government, the same rules and principles in respect of the reciprocal rights and obligations of the contracting parties as obtain between individuals (and which, as above shown, is the true measure of relief in such cases), it must be apparent that the action of defendant in ignoring the contract rights of claimant was without the slightest justification.

By that contract said parties "mutually agreed" that claimant "shall deliver . . . at such posts and camps "as are situated in the *interior* of the island of Cuba . . . "such quantities of FRESH BEEF, . . . as from time to "time they may require" (*R., 7–8*).

This contract with claimant, covering *all* posts and camps situated in the *interior* of the island, was exclusive, and secured to him the right to furnish the same at the agreed contract price throughout the term of his contract, January 5, 1899, to June 30, 1899, inclusive.

In this connection, be it remembered, that the advertisement for proposals (and under which claimant bid) expressly set forth that the quantities of beef to be delivered, as well, also, the *numbers* and *locations* of troops, were then *unknown*, and that bids must be made upon that understanding (*R.*, *7–8.*) This uncertainty and indefiniteness as to both quantities and locations was made necessary by the uncertain conditions then existing; and the contract was, accordingly, and of necessity, entered into in the form so prescribed; the same being, however, certain, definite and fixed as to the *uniform* rate per pound for the beef agreed to be supplied in accordance therewith. The contract, however, became certain, definite, and fixed by the establishment, from time to time thereafter, of camps and posts in the *interior* of the island, and as to such *interior* points said contract was not severable.

Notwithstanding the express and unambiguous language employed in the contract, leaving no room for uncertainty or doubt as to the exact subject-matter thereof, and the rights and liabilities of each of the contracting parties, claimant's efforts to supply beef at Quemados, under his contract, met with opposition from the chief and depot commissary in Cuba from the very beginning.

On January 10, 1899, claimant was ready to furnish beef in Cuba, under his contract, and so notified and reported to said commissary, but without result. On January 26, 1899, he again demanded of said commissary that he be allowed to furnish the beef, there being at that time about 7,000 soldiers stationed at that post. The commissary refused to allow him to deliver. Claimant cabled protest to Washington, and filed written protest with said commissary; where-

upon the acting commissary general in Washington cabled reply to said commissary in Cuba, advising him that Simpson's contract embraced posts and camps in the interior of the island. During the remainder of the month of January, and during the month of February, said commissary in Cuba purchased and continued to purchase from third parties beef on the hoof, for the use of the troops at Quemados (*R., 12*).

In February, said commissary in Cuba entered into a written contract with a local dealer covering supply of beef at said post of Quemados. This brought about another protest from claimant; and, on February 19, 1899, the commissary general in Washington cabled the commissary in Cuba to call upon Simpson in future without further competition when refrigerated beef was not available. Thereupon, said commissary in Cuba called upon claimant to furnish beef, under his contract, at said post of Quemados, and which order was complied with and filled by claimant for a period of 14 days in March, and at his contract rate (*R., 13*).

On March 10, 1899, said local commissary cabled Washington that Swift & Co. could furnish beef, refrigerated in Cuba, which while not of the quality specified in the Swift & Co. contract, yet as good as the quality specified in claimant's contract; and he inquired whether he should accept the beef from Swift & Co., of the quality specified in Simpson's contract. That inquiry was answered by cable: "Quality being same, take Swift's. Price lower" (*R., 14*).

Thereupon, the local chief commissary ceased to take beef from claimant, at the post named, and accepted Cuban beef from Swift & Co., at a lower price than that which was agreed to be paid claimant; against all of which, claimant again protested (*R., 14*).

This brought about a consideration of the entire matter by the Secretary of War; and, on May 4, 1899, he rendered his decision (herein above referred to), to the effect that the camp at Quemados is an *interior* post within the meaning of the

Simpson contract, and that Simpson's *contract right* to supply fresh beef to the troops stationed at that point is *sustained* (*R.*, *14*).

Pausing here for a moment, it is to be remembered that defendant, in violation of claimant's contract, made purchases of beef for use at the *interior* post and camp of Quemados from divers local dealers, and finally permitted Swift & Co., (the latter having absolutely no contract in that behalf with defendant,) to oust claimant from a part of the territory covered by his contract, namely, Quemados.

That this action was absolutely without authority in law, defendant has expressly admitted, as has just been shown by the decision of the Secretary of War, and which decision, it is respectfully submitted, is the only one that properly could have been rendered in interpreting the meaning of a written agreement, the language employed in which is so absolutely unambiguous and free from all doubt.

The Secretary of War having thus sustained claimant's contract right to supply fresh beef to the troops stationed at Quemados, proceeded, nevertheless, to point out a way in which claimant might be thereafter *eliminated* from the situation, as follows:

> "3. The attention of the commissary department is directed to paragraph VI of said contract with Simpson, which reads as follows:
>
> "'VI. This contract shall be in force from the 5th day of January, 1899, to the 30th day of June, 1899, inclusive, or such less time for any post as the commissary general of subsistence, U. S. Army, may direct.'
>
> "4. The commissary general of subsistence is at liberty to take such action under this provision of the contract as in his judgment the best interests of the Government require" (*R.*, *14*).

The way having been thus pointed out, defendant, under date of May 9, 1899, undertook to make the suspension of deliveries of fresh beef, as per the notification of March 12,

1899 (*supra*), cover the remainder of the contract term, so far as it covered said post at Quemados (*R., 14*).

There is no pretense made by defendant that said *interior* post at Quemados was abandoned, or that the troops had been removed therefrom during any part of claimant's said contract term, and the supply of beef at said post by others than claimant continued to the end of his said contract term (*R., 14–16*).

It is utterly inconsistent with and repugnant to the contract theory in general, and with this contract in particular, where both parties solemnly "mutually agreed," the one to furnish and supply, and the other to accept and pay for, fresh beef "at such posts and camps as are situated in the *interior* of the island of Cuba," that any such unilateral right and privilege as that asserted by defendant in this case should exist.

Such contention, if sustained, would logically lead to the result that claimant was absolutely bound to supply fresh beef to *every* interior post and camp on the island, while defendant reserved to itself the unusual and extraordinary (but *exclusive*) privilege of either accepting or declining such beef at any *particular* interior post or camp, accordingly as it might or might not be able to make more favorable terms with other dealers during said contract term.

This is certainly not the law; it was not so stipulated in the contract, nor was it in contemplation of either of the contracting parties.

That said paragraph VI of the contract was intended to reserve no such *arbitrary* right and privilege to defendant is abundantly shown by the terms of the contract itself, and by the conduct of the parties.

In order to a proper understanding of the true meaning of the reservation contained in said paragraph VI, it is proper to bear in mind that the subject-matter of this contract was, in its scope, quite different from the ordinary contract, covering the beef supply at a specific army post: Here

it was not definitely known, at the time claimant's contract was entered into, just where the various United States troops would be located on the island of Cuba, nor the numbers of such troops when so located. Had the exact *location* of the various troops, camps, and posts been thoroughly known and decided upon, there would have been no difficulty in making the contract cover, specifically, certain named posts. As it was, not only was the question of *location* of the various posts not known, but it was, likewise, equally uncertain as to the *duration* of the occupation of any particular post or camp that might be established. This being so, the Government prepared this contract in a form which would secure to it its *entire* fresh-beef supply for such posts and camps as then were or might thereafter be situated in the *interior* of the island, reserving to itself the right to terminate such supply of beef at any particular *interior* post or camp, in the event the same might be thereafter abandoned by the Government and the troops moved away during the term of the contract.

This is the only fair and reasonable interpretation to be put upon said paragraph VI, and that interpretation is one which not only does no violence to the language employed, but secures to each of the contracting parties the rights and obligations of the contract. The reservation was not intended to secure to the Government the right to *arbitrarily* deprive claimant of his contract at any particular post, simply to secure a pecuniary benefit to the United States by obtaining beef from others at a lower price than that fixed by the contract; nor has such reservation ever been so interpreted (aside from the action in this case), so far as counsel have been able to discover, as authorizing its use for any such purpose.

In the printed brief, as well also in the oral argument, on behalf of defendant, in the court below, it was contended that the claim for damages for loss of profit upon beef at the *interior* post and camp at Quemados could not be sustained,

because of the following provisions, found in paragraph 1 of the contract:

> "1. The said party of the second part shall deliver to the commissaries of the United States troops stationed at such posts and camps as are situated in the interior of the island of Cuba, at such prescribed hours on such days as, under the direction of their commanding officers they shall designate, such quantities of fresh beef, slaughtered, dressed and delivered in quarters, good in quality and condition, fit for immediate use, and from fore and hind quarter meats proportionally, including all the best cuts thereof, as from time to time they may require" (*R.*, 7).

In connection with that contract provision, it was contended on behalf of defendant that the *designation* and *requirement* referred to the commissaries in Cuba, and that without both designation and requirement by such commissaries, the contract right to deliver beef at any particular *interior* post and camp did not and could not accrue to claimant.

The exact intent and meaning of the agreement entered into between the parties is made so exceedingly specific and clear by the advertisement for proposals and the written contract based thereon, that there is here no necessity for conjecture or doubt.

The advertisement requested proposals for furnishing slaughtered fresh beef to the United States troops stationed at the posts and camps in the *interior* of the island of Cuba, for a specified period; but, it was added, the numbers and locations of the troops were, at that time, unknown, and that all bids must be submitted upon and with that understanding (*R*, 5).

The contract which followed as the result of that advertisement for proposals was worded in like language; thus making the contract applicable to the *entire* fresh beef supply for all posts and camps as then were or might thereafter be situated in the *interior* of the island, the quantities of

beef to be measured by the requirement (need) of the troops stationed at any such camp and post. Such contract provision did not in any sense contemplate or mean the arbitrary discretion or pleasure of any individual commissary; it did contemplate and mean that upon the establishment and location of any *interior* post and camp, claimant was under obligation to furnish, and he had the contract right to furnish, such quantities of beef as the need of the troops there stationed required (not merely the pleasure of the commissary at such post).

It was urged below that, in this case, so far as Quemados is concerned, there was neither designation nor requirement by the commissary; and that, therefore, claimant's contract right never really attached at that interior post.

That argument, however, is utterly untenable, and moreover it is not sustained by the findings of fact in this case.

It has already been pointed out, and the court below has so found, that the Secretary of War decided that Quemados was an *interior* post and camp *within the meaning of the language used in Simpson's contract*, and that his claim of contract right to supply fresh beef at that post was *sustained* (*R.*, *14*), and, furthermore, the commissary in Cuba did, in fact, *designate* Quemados as a post and camp to be supplied by claimant with fresh beef under his contract; and he did so supply it during a period of fourteen days in March, after which time, however, further deliveries by him at that post were suspended by said local commissary, simply and only because defendant found it possible (and profitable) to obtain native beef from other dealers at a lower price than claimant's contract rate.

In considering this objection, so urged below by defendant, it may be useful to first consider the authorities cited in supposed support of the objection:

In the Lobenstein case (*91 U. S., 324*), claimant had two contracts with the United States, under one of which he was

entitled to all the hides of beef cattle, at a certain place, and during a specified period, "which the superintendent of In-"dian affairs at that place shall decide are not required for "the comfort of the Indians; the number of hides to be "about 2,000, more or less;" the other contract was similar in its terms, and contained like provision for the hides of cattle slaughtered for Indians at another designated place, the number there being named as about 4,000, more or less. The Commissioner of Indian Affairs directed that *all* the cattle should be turned over on foot to the Indian agent; and this was done. They were all given out from time to time to the Indians, by whom they were killed; and, consequently, no hides could be delivered under the contract. This court there held that the determination of the requirement of hides for the comfort of the Indians was, under the contract, lodged in the superintendent of Indian affairs; and that if he decided that *all* thereof were so required by the Indians, that excused the United States from delivering to Lobenstein; and it was held, that the superintendent did, in effect, so decide.

In the Brawley case (*96 U. S., 168*) the contract required the delivery of a named quantity of oak wood "more or less, as shall be determined to be necessary by the post commander for the regular supply," at a designated army post. After supplying but a small part of the quantity named in the contract, the post commander, (within four days of the date of the formal contract,) notified Brawley that no more of the wood would be required; and the Court of Claims found, as a fact, that that post did not need (require) more than the quantity of wood so actually accepted from claimant.

This court held that the actual requirement of the Government, (*i. e.*, its need,) at said army post, (in the absence of bad faith,) measured and determined claimant's contract right, this because of the phraseology of the contract.

In the Kihlberg case, (*97 U. S. 398*), which involved a contract for the transportation of certain stores of the United States between designated points, it was provided that the distance of the transportation should be "ascertained and fixed by the chief quartermaster." The distance, as so ascertained and fixed by the chief quartermaster, was less than by air line, or by the usual and customary route; the difference, however, between his estimate of distances and those by air line, or by the road usually traveled, was not so material as to justify the inference that the chief quartermaster did not exercise the authority given him with an honest purpose to carry out the real intention of the parties, as collected from their agreement. That being so, and in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his determination in the premises was held to be conclusive upon both parties, and not subject to the revisory power of the courts; this, however, because of the plain terms of the contract.

So too, in the case of Gleason (*175 U. S., 588*), where the contract authorized an extension or extensions of time, in respect of the performance of the contract work, the same being made dependent, however, upon the judgment of the engineer in charge when applied to to grant such extension; it was held that his judgment was not subject to the revisory power of the courts, except upon allegation and proof of bad faith, or of mistake and negligence so gross as to justify the inference of bad faith—neither of which elements, however, were alleged or proved.

The same principle was also involved in two other cases cited below on behalf of defendant, but which need not here be specially commented upon, namely, Railroad Co. *vs.* March, (*114 U. S., 549*), and Railroad Co. *vs.* Price (*138 U. S., 185*).

It is respectfully submitted that none of the cases just referred to have any useful or controlling bearing upon the question involved in the present contract, and now being

considered, the rights and liabilities under which contract must necessarily be measured and determined by the particular facts of this case.

By the plain terms of the contract the designation by the commissaries *at* the posts was merely as to the hours and days for delivery. The scope of the contract was not to be enlarged or contracted by them nor by the direction of their commanding officers—the amount of beef to be delivered was what was required by the troops, and the places for delivery were posts and stations situated in the interior. It was the province of the Commanding General of the Army or the Secretary of War by special orders to locate the posts and camps, and fix the number of troops at each, and by general order as embodied in the regulations (Ed. of 1895, par. 1253) a pound and a quarter was fixed as the amount of fresh beef for each soldier. The commissaries had no control over either of these factors, but the failure of the commissary to designate the hours and days for the delivery of the articles claimant had contracted to furnish constitutes the very breach of contract which inflicted the injury.

The official designation of the advertisement for proposals was thus: "Subject: Beef for interior points in Cuba." The body of the advertisement itself, in unmistakable language, referred to the supply of fresh beef for the "United States troops stationed at posts and camps in the interior of the island of Cuba" (*R.*, *5*).

The language of claimant's proposal and bid was equally clear: "I will furnish beef for the United States troops at posts in the interior of Cuba at 14½c. per pound" (*R.*, *6*).

The contract itself contemplated and in explicit terms expressed the same subject-matter, namely, beef for interior posts and camps in Cuba (*R.*, *7*).

It would seem quite out of the question to now contend that, at last, the entire contract became subject to the mere pleasure of the commissary of troops at any particular *interior* post and camp, who might require or not require de-

liveries of beef by claimant accordingly as he willed, and thus render the contract entirely optional with such commissary; and this notwithstanding the presence of troops at such interior post.

Given the location and establishment of an interior post and camp, and the presence there of United States troops, it was the requirement (need) of the latter, not of the commissary, that measured and determined the contract right of claimant.

The commissary of troops did not and could not locate the posts and camps, nor could he fix the number of such troops, nor the amount of the soldiers' ration, in short, the *requirement* of the troops as to quantities of beef; all of those elements were otherwise, and by other and higher authority, fixed and determined. Having been so fixed and determined, claimant's contract right attached, and, thereupon, it became the duty of the commissary of such troops to notify claimant, not what beef he, the commissary, required, but what the given number of troops required, and therein to specify the quantities as so ascertained and fixed, and to prescribe the hours and days of the deliveries.

The failure of the commissary of troops to so designate either quantities, or hours and days for the delivery of the beef claimant had contracted to furnish, not only did not prevent claimant's contract right attaching, but would of itself constitute a breach of the contract by defendant.

If this be not so, then the contract imposed no obligation upon the Government, except in so far as it might, from time to time, meet the pleasure of a local commissary of troops in Cuba, or be deemed profitable to permit and require claimant to deliver at any particular post and camp.

It is quite evident that defendant permitted claimant to supply beef under his contract at many interior points on the island, and where it, perhaps, found it convenient and profitable to allow him so to do; but at this particular post

and camp, Quemados, lower rates were obtained from other dealers, and so claimant's contract right was there ignored.

Having referred to the cases so relied upon below by defendant, and having again called attention to some of the controlling facts in this case, bearing upon the question here being considered, it may be useful to consider other decided cases, both State and Federal, in which the question has been considered:

For example, Railroad Co. *vs.* Detroit (*64 Mich., 360*), petition alleged that land was "required for public use;" held, equivalent to "necessary for public use."

In McKeever *vs.* Iron Co. (*138 Pa. St., 184*), the words "you may require" were held equivalent to "you may need."

In Minnesota Lumber Co. *vs.* White-breast Coal Co. (*160 Ill., 85*), the defendant, lumber company, contracted to purchase of plaintiff, coal company, its "requirements" of coal for a certain season, and plaintiff was to furnish the same at a certain rate per ton. Held, that the contract was not void for uncertainty or want of mutuality; but that it evidently meant to call for the amount of coal which the company should *need* in its business for such season, and not merely what it might *choose* to require of the other party.

In Wolff *vs.* Wells, Fargo Co. (*115 F. R., 39, C. C. A.*) the words were "what you may require." Throughout the opinion, the word "require" was used in the sense of "need." Defendant was "notified of the amount required."

Also, in the case of Crane *vs.* Crane & Co. (*105 F. R., 869*) the opinion of the court refers to that class of contracts wherein, because of the exigencies of the situation, it is not always possible to definitely state quantities and amounts, and adds:

> "It is within legal competency for one to bind himself to furnish another with such supplies as may be

> needed during some certain period for some certain business or manufacture. . . . Reasonable provision in business requires that such contracts, though more or less indefinite, should be upheld. Thus a foundry may purchase all the coal needed for the season; or a furnace company its requirements in the way of iron; or a hotel its necessary supply of ice." (Citing cases.)

In Fertilizer Co. vs. Phosphate Co. (*121 F. R. 298 C. C. A.*) the former agreed to buy from the latter, for a period of five years, its entire consumption of phosphate rock, at a fixed price, and the other party agreed to supply the same as ordered; it being stipulated that the quantity used by the buyer was understood normally to amount to 1,500 tons a year, but that it should have the right to demand as much as 3,000 tons. The vendee, for more than a year during the term of the contract, ordered no rock, but made substitute purchases from other manufacturers, because then more profitable. At the end of that time, however, the price of rock having materially increased, it ordered the maximum of 3,000 tons for the ensuing year, under the contract. It was held, that the contract imposed upon both parties an obligation to perform, and that the action of the purchaser in so ignoring, for part of the contract period, the contract obligation to purchase, simply because then more profitable, and thereafter, when it was more profitable to purchase under the contract, resuming its purchases thereunder, constituted a substantial breach.

In the Mueller case, (*19 Ct. Cl. 581,*) the decision of the court is thus accurately stated in the syllabus:

> "The word 'required' which occurs frequently in Government contracts may relate to the wants of the service, or to the unsettled purpose of the Government. Where the provision is to furnish stone '*at such times and in such quantities as may be required,*' the word must be construed to refer to the wants of the service."

The judgment in that case was affirmed by this court, (*113 U. S. 153*;) that the word "require" could mean the request of a local officer, irrespective of the needs (varying or fixed) of the Government, was not suggested.

That contracts with the Government containing provisions for variation in quantities are binding alike upon both parties has been recently again considered and decided by this court, in the case of Moore (*196 U. S., 157*), the opinion wherein, while not here strictly analogous in its facts or the principles involved, may be here quoted from, as follows:

> "In engagements to furnish goods to a certain amount, the quantity specified governs. Words like 'about' and 'more or less' are only for the purpose of providing against accidental and not material variations.
>
> "Under the contract in this case for delivery of 'about' 5,000 tons of coal, the United States cannot refuse to accept more than 4,634 tons, but is liable for the difference in value on 366 tons tendered and acceptance refused."

The determinative point in the case at bar, as fixed by the contract itself, was the establishment and location of the interior post and camp, and the number of troops; those matters were determined by the commanding officer. The local commissaries had no discretion; they could only inform the contractors of the decrees of the commander, and specify the hours and days of the deliveries.

That beef was required by the United States troops stationed at said interior post and camp at Quemados, during the entire term of the Simpson contract, has already been shown; and that requirement, as found by the court below, aggregated 785,997½ pounds of beef, all of which was purchased by defendant from others than claimant, and during his contract term (*R., 16*).

Defendant, however, seeks to interpret the word "require" as synonymous with "request," but this fails unless there

be added the words, "as they may request of the party of the second part." It is certain that all the beef for which this suit is brought was "requested" by the various commissaries. It was not requested of claimant, and therein lies the breach of the contract. Unless the United States may introduce new words to radically change the plain language, claimant was entitled to furnish all the beef at the interior points which they, the troops, required—that is to say, *needed*, or which the commissaries requested any one to furnish for such use.

Without further pursuing this branch of the case, it is respectfully submitted that claimant's contract right to supply fresh beef to the United States troops stationed at the *interior* post and camp of Quemados, on the island of Cuba, during the *entire* contract term, to wit, January 5, 1899, to June 30, 1899, inclusive, should be sustained, and that judgment should be entered in his favor covering the amount of profit on the quantities of beef purchased by defendant from dealers other than claimant, during said period, and which profit he could have made had he been permitted to supply same, and to which profit he was entitled, namely, the sum of $31,439.90 (*R.*, *14*).

2.

HAVANA AND MATANZAS.

Passing now from the question as to the contract right of claimant to supply beef at Quemados, the attention of the court is respectfully asked to the remaining branch of the claim set forth in the petition herein, covering the claim of right on the part of claimant to supply beef to defendant at the cities of Havana and at Matanzas (being points on the *seacoast* of Cuba) when Swift & Co., under their contract, did not supply the same.

While, as hereinabove stated, the contract with Swift & Co. covered refrigerated, chilled, or frozen beef, slaughtered

in the United States, and delivered in bulk, "at points on the *seacoast* of the island" (*R., 20*), and the contract with claimant, Simpson, covered fresh beef, delivered "at such posts and camps as are situated in the *interior* of the island" (*R., 7*), it was, nevertheless, the purpose and intention of the Government to cover the *entire* beef supply of the island of Cuba by the two contracts, the one being supplementary to the other (*R., 15*).

Prior to entering into said contract and for the purpose of ascertaining its exact purpose and scope, claimant inquired of the then Commissary General of Subsistence in regard thereto, and was by him informed that when Swift & Co. could not furnish refrigerated beef at the seacoast, under their contract, claimant's contract covered the *entire* island (*R., 15*).

That this was the true understanding and agreement between the contracting parties cannot be successfully controverted, even though the terms of the contract itself, literally construed, might not embrace any territory on the island not included within the designation or description *interior* "posts and camps."

Before examining the construction put upon the terms of the agreement and contract by the parties thereto, as shown by their conduct, the attention of the court is invited to the rule of decision in such cases laid down by this court in the case of District of Columbia *vs.* Gallaher, affirmed on appeal by the Supreme Court of the United States (*124 U. S., 505*), where it was thus stated:

> "We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract."

And see also the following cases:

Raub *vs.* Barbour (*6 Mackey, D. C., 245*);
Mason *vs.* Spaulding (*18 D. C., 115*);
C. & O. Canal Co *vs.* Hill (*15 Wall., 94*);
Ware *vs.* Allen (*128 U. S., 590*).

That the Government *intended* claimant's contract to cover not only *interior* posts and camps, but also points on the *seacoast*, whenever Swift & Co., under their contract, could or did not supply the same, and that claimant understood that he was obliged so to do, is abundantly shown by the conduct of the contracting parties.

For example, the following points on the *seacoast* of the island were supplied by claimant under his contract, some during a part of his contract term and others during the entire term thereof: *Trinidad, Cienfuegos, Cardenas, Matanzas, Habana, Manzanillo, Santiago de Cuba*, and *Gibara* (*R. 16–18*).

The orders to claimant in respect thereof were professedly based upon claimant's *contract*.

Take, for example, the following order to claimant from the chief and depot commissary, dated January 18, 1899, covering, among others, points on the *seacoast* named:

> "I have to inform you that I have this day notified, by wire, the commissaries at the following points to call on you for fresh beef, *under your contract*, from and after date set opposite each:
>
> * * * * * * *
>
> "*Trinidad*, January 23, 1899.
>
> * * * * * * *
>
> "*Cienfuegos*, January 21, 1899."
>
> (*R., 16–17.*)

And, again, similar order, under date of January 25, 1899:

> "In accordance with your verbal request of today, I have to advise you that the following points are to be supplied by you *under your contract:*
>
> * * * * * * *
>
> "*Trinidad.*
> "And until Swift & Co. are prepared to furnish:
> "*Cienfuegos.*
> "*Cardenas.*"
>
> (*R., 17.*)

These orders were not mere matters of favor, but were intended to be, were in fact, and were described as being, *under claimant's contract* (*R., 17*).

The *first* contract of Swift & Co. expired by limitation, December 31, 1898; and that contract covered, as has already been shown, beef slaughtered and refrigerated in the United States, and to be delivered at points on the *seacoast* of Cuba. The subsequent and *second* contract between defendant and Swift & Co., (covering the same subject-matter,) was not entered into until February 23, 1899. During said intervening period, there was no existing contract with Swift & Co. (*R. 16*).

Intermediate said two dates, as well also subsequent to the date of said second contract with Swift & Co., defendant purchased, from others than claimant, (but against his protest,) beef slaughtered in Cuba, and used, with or without refrigeration, at the cities of Havana and Matanzas, Cuba, from January 1 to June 30, 1899, covering the term of claimant's contract, aggregating 683,924 pounds (*R. 16*).

Defendant not only purchased native beef, slaughtered on the island, and from dealers other than claimant, but it also purchased from Swift & Co. large quantities of native beef slaughtered on the island and there refrigerated, and this absolutely without contract (*R. 16*).

The court below has expressly found that it was the purpose and intention of defendant, and so communicated to claimant, to cover the *entire* beef supply in Cuba, both *interior* and *seacoast*, by the two contracts, Swift & Co. and Simpson; and that when the former did not or could not supply the beef, the latter should (*R., 15*).

That this was the real agreement of the parties is further evidenced by the official correspondence relating to that matter:

On February 18, 1899, Major A. L. Smith telegraphed from Havana:

> "Please inform me if Simpson should in future be called upon without further competition to supply

beef here and elsewhere in Cuba when refrigerated beef is not available. Immediate decision urgently needed" (*R., 17*).

The answer of Acting Commissary General Davis, February 19, 1899, was:

"Call upon Simpson in future without further competition when refrigerated beef is not available" (*R., 17*).

On February 20, 1899, Major A. L. Smith telegraphed to the commissaries at Matanzas, Pinar del Rio, Guanajay, Cienfuegos, Trinidad, Sancti Spiritus, Nuevitas, Puerto Principe, Gibara, and Manzanillo, as follows:

"Under authority of telegram of the Commissary General of 19th instant, you are directed to call in future on Simpson for fresh beef, without further competition, when refrigerated beef is not available" (*R., 18*).

Of these Matanzas, Cienfuegos, Trinidad, Gibara, and Manzanillo were on the coast (*R., 18*).

Thereafter, Colonel Smith wrote as follows:

"HEADQUARTERS DIVISION OF CUBA,
"OFFICE CHIEF COMMISSARY,
"HAVANA, *February* 21, 1899.

"Mr. G. W. SIMPSON,
"(*c/o J. F. Berndes und Co.*),
"64 *Cuba, Havana.*

"SIR: I have to advise you that, acting under instructions contained in telegram of the Commissary General of the 19th instant, I have instructed commissaries throughout the island to call upon you to furnish fresh beef under your contract whenever Swift and Co. cannot deliver fresh beef (refrigerated) under their contract.

"Respectfully, A. L. SMITH,
"*Lt. Colonel, C. S., U. S. Army,*
"*Chief and Depot Commissary.*" (*R., 18.*)

Nevertheless, defendant made the purchases of beef for the supply needed at the two points named, from divers persons, including Swift & Co.; and, in its purchases from Swift & Co. defendant waived the express contract provisions entered into with that firm, which contract required, as follows:

> "1. Refrigerated, frozen, or chilled beef, from fat steers, slaughtered in the United States, and delivered at points on the *seacoast* of the island.
> "2. Beef to dress 600 pounds to the carcass" (*R., 21*).

Those requirements and standards were so modified and changed by defendant as to permit Swift & Co. to furnish:

> "1. Native beef, slaughtered on the island, and refrigerated there, or used without refrigeration.
> "2. Beef to dress 400 pounds to the carcass; and allowing delivery of beef from spayed heifers" (*R., 13–14; 18–19*).

This change in requirements and standards at once gave Swift & Co., without any contract in that behalf, the benefit of the more favorable terms secured by claimant, Simpson.

The sole excuse and attempted justification for said *unauthorized* action is found in the telegram sent by defendant to said chief and depot commissary at Havana, March 11, 1899:

> "Quality being same, take Swift's. Price lower" (*R., 14*).

In this brief telegram is to be found the defendant's theory of the rights of claimant as applied by it to his contract, from the beginning to the end: "Quality being the same, *and price lower*," ignore claimant and buy from others; "*price higher*," require claimant to furnish *under his contract*.

This measure of claimant's contract rights, as applied by defendant, is so clearly shown in the record that the conclusion is irresistible that defendant treated claimant as being

under contract obligation to supply the fresh beef for Cuba whenever and wherever, *interior* or *seacoast*, it resulted in pecuniary benefit to the Government. While such course of action may be praiseworthy from a purely economical standpoint, it is not in accordance with the fundamental theory of contract obligations and rights.

The court below has found that claimant could have derived a profit at said two places, had he been permitted to make deliveries of beef, the same amounting to $27,356.96, no part of which, however, has been paid him.

3.

CONCLUSION.

Without further prolonging the argument in the printed brief, it is respectfully submitted that the judgment of the court below, dismissing claimant's petition, should be *reversed*, and that judgment should be directed to be entered herein in favor of claimant and against the United States for the respective amounts claimed by him, as set forth and found by the court below in its findings of fact.

Respectfully submitted,

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WASHINGTON, D. C., *October* 11, 1905.